95-1097 (1)

Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

MARY E. HOGAN, COLE TAYLOR BANK, AS TRUSTEE UNDER TRUST NO. 77-432 DATED DECEMBER 19, 1977, SAM LOIACONO, RUTH LOIACONO, and LAKE BARRINGTON INDUSTRIAL PARK ASSOCIATION,

Petitioners,

v.

VILLAGE OF LAKE BARRINGTON, an Illinois Municipal Corporation, VILLAGE OF LAKE BARRINGTON SPECIAL SERVICE AREA NUMBER THREE, NANCY SMITH and JAMES P. BATEMAN,

Respondents.

On Petition for Writ of Certiorari to the Appellate Court of Illinois, Second District

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does due process require that the failure to effect personal service of the notice of public hearing on 18 of the 65 different property owners in a proposed Special Taxing District result in the invalidation of the taxing ordinance?

PARTIES TO THE PROCEEDINGS

The caption of the case in this Court contains the names of all parties to the proceedings in the Appellate Court of Illinois.

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On Petition for Writ of Certiorari to the Appellate Court of Illinois, Second District

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The Order of the Circuit Court of Lake County, Illinois granting Petitioner's original Motion for Summary Judgment on the basis of the lack of personal service of the tax notice and insufficient content of the tax notice was entered March 30, 1994, is unreported and is reprinted at Page 25 of the Appendix to this Petition.

The Order of the Illinois Appellate Court, Second Judicial District, reversing the decision of the Circuit Court of Lake County, Illinois, was entered on May 2, 1995, is reported at 272 Ill.App.3d 225, 649 N.E.2d 1366, 208 Ill. Dec. 705 and is reprinted at Page 1 of the Appendix to this Petition.

The Order of the Illinois Appellate Court, Second Judicial District, denying Petitioner's Petition for Rehearing was entered on June 9, 1995, is unreported and is reprinted at Page 23 of the Appendix to this Petition.

The Order of the Illinois Supreme Court denying the Petition for Leave to Appeal was entered on October 26, 1995, is reported at 163 Ill.2d 560, 657 N.E.2d 623, 212 Ill.Dec. 422 and is printed at Page 24 of the Appendix to this Petition.

JURISDICTIONAL STATEMENT

Petitioners invoke this Court's jurisdiction pursuant to 28 USC Sec. 1257(a). The Illinois Appellate Court, Second Judicial District, reversed the Summary Judgment entered by the Circuit Court of Lake County, Illinois, in favor of Petitioners and that Order reversing was entered on May 2, 1995. The Illinois Supreme Court denied Petitioners' timely filed Petition for Leave to Appeal on October 4, 1995. The Petition for Writ of Certiorari was filed within 90 days of the denial of the Petition for Leave to Appeal in the Illinois Supreme Court.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States, Amendment XIV, Section 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

35 ILCS 235/5 (West 1992). Establishment of special service area-Ordinance-Notice-Hearing

5. Prior to or within 60 days after the adoption of the ordinance proposing the establishment of a special service area the municipality or county shall fix a time and a place for a public hearing. Notice of the hearing shall be given by publication and mailing, except that notice of a public hearing to propose the establishment of a special service area for weather modification purposes may be given by publication only. Notice by publication shall be given by publication at least once not less than 15 days prior to the hearing in a newspaper of general circulation within the municipality or county. Notice by mailing shall be given by depositing said notice int he United States mails addressed to the person or persons in whose name the general taxes for the last preceding year were paid on each lot, block, tract or parcel of land lying within the special service area. Said notice shall be mailed not less than 10 days prior to the time set for the public hearing. In the event taxes for the last preceding year were not paid, the notice shall be sent to the person last listed on the tax rolls prior to that year as the owner of said property.

STATEMENT OF THE CASE

I. The Factual Background

In December of 1990, the Village of Lake Barrington, Illinois hired John Reindl as a Special Projects Coordinator whose initial duties related to the creation of a proposed Special Service Area (SSA). The proposed SSA contemplated the installation of an underground municipal waterline and sewer system to service an area within the Village limits known as the Lake Barrington Industrial Park. The Village does not have sewer or municipal water in either its residential or its industrial areas, but is served by individual well and septic systems.

After Reindl's initial investigation, the Village held two public informational meetings, on January 22, 1992 and April 22, 1992, relative to the proposed SSA. After the two informational meetings were held, the Village elected to go forward on the project and adopted its first ordinance, on July 7, 1992, establishing a public hearing date of July 29, 1992.

The Village published Notice of the public hearing in the local newspaper, the Daily Herald, on July 13, 1992. The notice was also mailed to 47 of the 65 different property owners in whose names the general taxes for the preceding year had been paid. The Notice that was mailed to a portion of the owners of record stated that the public hearing was convened to "consider forming" the proposed SSA.

The public hearing was held on July 29, 1992. After the hearing, petitions objecting to the SSA were filed but contained an insufficient percentage of the requisite signatures of owners and electors to invalidate the ordinance. The Village then adopted the establishing ordinance for the SSA and a bond ordinance.

Petitioners hired an attorney to represent them in connection with redressing certain defects in the enabling process relative to the SSA. The Village first threatened to file, then filed suit against the Petitioners for allegedly interfering with the bond sale by hiring an attorney to represent them in seeking a judicial declaration of the invalidity of the SSA Ordinance. The Petitioners counterclaimed for a declaration of the invalidity of the SSA and for civil rights violations.

II. The Proceedings In The Courts Below

The trial court, on cross-motions for summary judgment, ultimately ruled that the subject ordinances were invalid because the written Notice did not satisfy the statutory requirement for personal service by mailing upon the individual owners and also that the Notice was insufficient in content. The trial court ruled, as a matter of law, that the SSA had not been gerrymandered. The Petitioners' civil rights claims were dismissed, but the court awarded the individual petitioners attorney's fees as a sanction for the Village's filing of the tortious interference with bond sale suit.

The Illinois Appellate Court, Second Judicial District, affirmed in part, reversed in part, and remanded, to wit:

1.) reversed the order of the trial court on the issue of the legitimacy of the SSA ordinances, finding that personal service of Notice on the individual property owners was neither mandatory or jurisdictional to conducting the SSA public hearing;

2.) found that the statutorily required contents of the written notice to the individual property owners were merely directory statutory provisions, i.e., not mandatory.

3.) ruled that the failure of the Village to disclose the identity of the property owners included within the SSA at the public hearing was not a violation of Section 9 of the Act.

4.) affirmed the trial court's finding, as a matter of law, that the SSA had not been gerrymandered.

5.) reinstated Petitioners' civil rights claims.

The Appellate Court denied Petitioners' Petition for Rehearing. The Illinois Supreme Court denied Petitioners' Petition for Leave to Appeal.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

I.

THE DECISION BELOW DECIDES AN IMPORTANT QUESTION OF FEDERAL LAW IN A WAY WHICH CONFLICTS WITH THE APPLICABLE DECISIONS OF THIS COURT.

Section 5 of the Illinois Special Service Area Tax Act (the Act) provides that notice of the hearing regarding the establishment of a special service area shall be given by publication in a newspaper of general circulation in the county and by mailing. (35 ILCS 235/5 (West 1992).) Section 5 specifically provides as follows:

> "*Notice* by mailing *shall be given* by depositing said notice in the United States Mail *addressed to the person or persons in whose name the general taxes for the last proceeding year were paid on each lot* *** within the special service area. *** In the event taxes for the last preceding year were not paid, the notice shall be sent to the person last listed on the tax rolls prior to that year as the owner of said property."

35 ILCS 235/5 (West 1992).
(emphasis added)

The United States Supreme Court in the case of *French v. Edwards* (1872), 80 U.S. 506, 20 Law.Ed. 703, set forth the general rule governing whether the provisions of a tax statute are mandatory or directory, when it stated as follows:

> "There are, undoubtedly, many statutory requisitions intended for the guide of officers in the conduct of business devolved upon them, which do not limit their power or render its exercise in disregard of the requisitions ineffectual. Such, generally, are regulations designed to secure order, system and dispatch in proceedings, and by a disregard of which the rights of parties interested cannot be injuriously affected. Provisions of this character are not usually regarded as mandatory unless accompanied by negative words importing that the acts required shall not be done in any other manner or time than that designated. **But when the requisitions prescribed are intended for the protection of the citizen, and to prevent a sacrifice of his property, and by a disregard of which his rights might be and generally would be injuriously affected, they are not directory but mandatory. They must be followed or the acts done will be invalid. The power of the officer in all such cases is limited by the manner and conditions prescribed for its exercise."**
>
> *French v. Edward*, 80 U.S. 506, 511, 20 L.Ed. 702, 703 (1872).
>
> (emphasis added)

The United States Supreme Court, relying on *French v. Edwards*, invalidated a special improvement tax in the case of *Lyon v. Alley*, 130 U.S. 177, 32 L.Ed. 899, 9 S.Ct. 480 (1889), when it stated as follows:

> "This proposition presents the question whether the failure of the commissioner to deposit with the register a statement of the taxes upon the lots, . . . and the failure of the collector to give the required notice to such persons, constituted such a nonobservance of the requirements of the statute as to render invalid . . . the tax sale . . . .
>
> In view of the specific and imperative language of these provisions, and more especially of their nature and obvious purpose, we cannot doubt that they were intended as *conditions precedent*, a strict compliance with which was necessary in order to make the tax chargeable as a lien upon the lots."
>
> *Lyon v. Alley*, 130 U.S. 177, 184, 32 L.Ed. 899, 902 (1889).

The *Lyon v. Alley* court reasoned as follows:

> "The provisions of statutes as to the form and mode of assessments, as to tax lists, and the place where the tax lists are to be deposited, are, according to the highest authority, designed for the benefit of the taxpayers and the protection of their property from sacrifice."
>
> *Lyon v. Alley*, 130 U.S. 177, 185, 32 L.Ed. 899, 902 (1889).

The foregoing cases have been followed in every federal circuit; as well, they have been followed in every state court in which the issues have been addressed, including the Illinois Supreme Court.

It is undisputed that there are only 65 *different* property owners within the proposed SSA and that 18 individuals (almost 28%), who were specifically identified by the Petitioners, were not sent the statutorily required notice by mail. The Appellate Court invalidated the SSA only as to that parcel owned by Ruth Loiacono, since she

was the only specifically named individual who, in the court's opinion, had standing in the litigation. The court disregarded the principle that the notice requirements are "*conditions precedent*" to the validity of the tax; i.e., once it has been conclusively established that the notice requirements have not been met, the entire ordinance must be declared invalid. Absent the personal notice to the specific individuals who have been singled-out for disparate taxation, it is impossible to ascertain the consciousness of those selected citizens on the issue of whether they oppose or support the proposed tax. More dangerously, the taxing process becomes rife with the insidious potentiality of deliberately denying notice of the public hearing to those citizens who may be known, in advance, to vocally oppose such a tax and relish the opportunity to make a public record of their opposition. To this day, apart from three members of the Lake Barrington Industrial Park Association who filed affidavits attesting to the failure of the Village to send them notice and their opposition to the SSA, the knowledge (or, as is more probably the case, *lack* of knowledge) of the other fourteen individuals who were denied mailed notice of the public hearing remains unascertained.

The Appellate Court made much of the notion that such ordinances are presumptively valid. Again, the court failed to comprehend the fact that the notice requirements are the fundamental due process foundation—which requirements must be complied with *first*—in order to give rise to the presumption. An undisclosed, unnoticed "public hearing" does not become permissible on the basis of a presumption that cannot exist until after the hearing is *properly held* pursuant to the strict requirements of the enabling statute.

CONCLUSION

Petitioners, Mary E. Hogan, Sam Loiacono, Ruth Loiacono and the Lake Barrington Industrial Park Association, respectfully submit that this Court should grant this Petition and direct a Writ of Certiorari to the Appellate Court of Illinois, Second Judicial District, to review its Order reversing the Circuit Court of Lake County and holding the Special Service Area tax valid.

Respectfully submitted,

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App. 1

[Filed May 2, 1995—Pub. in Full]

No. 2-94-0839

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

THE VILLAGE OF LAKE BARRINGTON and VILLAGE OF LAKE BARRINGTON SPECIAL SERVICE AREA NUMBER THREE,

Plaintiffs-Appellants and
Counterdefendants and
Cross-Appellees,

v.

MARY E. HOGAN, SAM LOIACONO, and RUTH LOIACONO,

Defendants-Appellees and
Counterplaintiffs and
Third-Party Plaintiffs
and Cross-Appellants

(Cole Taylor Bank, as Trustee under Trust No. 77-432, Dated December 19, 1977, and Unkown Owners, Defendants-Appellees and Cross-Appellants; Lake Barrington Industrial Park Association, Counterplaintiff and Third-Party Plaintiff and Cross-Appellant; Nancy Smith and James Bateman, Third-Party Defendants and Cross-Appellees).

Appeal from the Circuit Court of Lake County.
No. 93-MR-11
Honorable William D. Block, Judge, Presiding.

JUSTICE THOMAS delivered the opinion of the court:

The plaintiffs, the Village of Lake Barrington and the Village of Lake Barrington Special Service Area Number

Three (collectively the Village), filed a three-count amended complaint against the defendants, Mary E. Hogan, Sam Loiacono and Ruth Loiacono. Count I of the Village's amended complaint sought a declaration that the ordinances it adopted creating a special service area were valid. Count II of the amended complaint alleged that the defendants tortiously interfered with the Village's contract with the company that was to provide the bonding for the project. Count III of the amended complaint alleged that the defendants tortiously interfered with the Village's economic advantage. Pursuant to section 1983 of the Civil Rights Act (42 U.S.C. 1983 (1992), the defendants brought a two-count counterclaim against the plaintiffs and a third-party complaint against third-party defendants James Bateman and Nancy Smith. The defendants also brought a counterclaim seeking a declaration that the Village ordinances creating the special service area were invalid. The Village appeals from the trial court's summary judgment order finding that the ordinances creating the special service area were not validly enacted. The Village and Bateman appeal the trial court's order imposing sanctions against them pursuant to Supreme Court Rule 137 (134 Ill. 2d R. 137). The defendants appeal the trial court's dismissal of their counterclaims.

The pleadings, exhibits, and affidavits on file reveal that in December 1990, John Reindl was hired by the Village to coordinate the creation and implementation of a special service area in a location known as the Lake Barrington Industrial Park (Park). The Village adopted its first ordinance with respect to the project on July 7, 1992, which established a public hearing date of July 29, 1992. The Village then attempted to satisfy the statutory

notice requirements. Notice of the hearing was published in the Daily Herald on July 13, 1992.

According to Reindl's affidavit, he mailed notices to the person or persons in whose names the general taxes for the preceding year had been paid. He based his decision of who should receive notice on information appearing in duplicate tax receipts. He explained that when he sent the notices he was unaware this information was not as comprehensive as the actual tax bills and that the names of some individuals on behalf of whom taxes were also paid were left out. The notices were sent by first-class mail and also by certified mail.

Defendant Ruth Loiacono, one of two persons in whose names the taxes had been paid for a single parcel of land in the special service area, was not mailed a notice. A notice was signed for by her husband, defendant Sam Loiacono. Phyllis Pynsky, Mildred Drasen, and Margaret Malo were also not mailed notices, but they are not parties to this action.

After the public hearing was adjourned on July 29, 1992, defendants Mary Hogan, Sam Loiacono, and Ruth Loiacono filed objections to the service area. However, the total number of objections filed was less than the 51% required by statute to prevent the creation of the special service area, the levy of taxes, and the sale of bonds. Specifically, two of the five registered voters signed objections, and 46 out of 127 owners of record filed objections.

Thereafter, the Village adopted an ordinance establishing the special service area. The area consisted of 100 separate parcels and 127 owners of record. It also adopted an ordinance which provided for the levy of

taxes and the sale of bonds in the aggregate amount of $7 million. The Village then entered into an agreement with Bernardi Securities, Inc., for the sale of the bonds.

According to the Village's amended complaint, Village attorney James Bateman had a series of communications with attorney James Hecht, who represented defendant Mary Hogan. Hecht had attended a Village Board meeting, at which time he had raised certain legal objections to the establishment of the special service area. Bateman had a conversation with Hecht on November 12, 1992, in which Bateman disclosed to Hecht that the bond ordinance would be adopted very soon and that Hecht should conclude his review as soon as possible. On December 3, 1992, Hecht told Bateman in a telephone conversation that he was preparing a suit to enjoin the sale of the bonds. On December 9, 1992, in another telephone conversation, Bateman informed Hecht that his threat of litigation was holding up on the bond sale closing, which had been sent for December 14, 1992. According to the Village's amended complaint, Hecht's threat of litigation prevented the Village from closing on the bonds on December 14, 1992. On December 18, 1992, Bateman spoke on the telephone once more with Hecht, who was told that his threat of litigation was interfering with the ability of the Village to close on the sale of the bonds, since the Village could not represent to bond counsel that there was no pending or threatened litigation. In that conversation, Hecht denied that the had threatened litigation. Bateman then sent a letter to Hecht on December 21, 1992, to confirm this statement.

On December 22, 1992, Bateman had another telephone conversation with Hecht, in which Hecht refused to confirm his earlier denial that the defendants had

threatened or were threatening suit and stated that he "did not like how this matter was going." Hecht's subsequent letter to Bateman of December 22, 1992, recited certain defects in the special service area proceedings.

The sale of the bonds never closed. The Village contends that the closing was prevented by the persistent threat of litigation by Hecht on behalf of defendant Mary Hogan and certain other undisclosed clients of Hecht.

According to the defendants' counterclaim, Hecht advised Bateman sometime prior to December 9, 1992, that a suit would be filed to contest the validity of the ordinances creating the special service area. Thereafter, Bateman met with Village president Nancy Smith, and the two agreed that the defendants should be dissuaded from filing a lawsuit. Notwithstanding the defendants' constitutional rights to challenge the validity of the ordinances, Bateman advised Hecht sometime before December 7, 1992, that if Hecht's clients sought a judicial determination of the validity of the ordinances, the Village would file an action for damages against his clients. At that point, Hecht's clients advised him not to file suit in view of the Village's threat to sue them for $6 million in damages.

Thereafter, Bateman repeatedly attempted to ascertain the identify of Hecht's clients so that he could file suit against them on behalf of the Village. On January 5, 1993, the Village and Bateman carried out their threats and filed suit against the defendants, alleging in essence that the defendants were liable in tort for having considered to seek a judicial determination with respect to the validity of the ordinances.

[The following material is nonpublishable under Supreme Court Rule 23.]

On January 5, 1993, the Village filed a two-count complaint against defendants Mary Hogan, Sam Loiacono, and Ruth Loiacono seeking a declaration of the validity of the special service area ordinances, as well as money damages for tortious interference with contract. The complaint was dismissed by the trial court, but the Village was granted leave to file an amended complaint, which it filed on March 22, 1993.

On April 15, 1993, the defendants filed a counterclaim against the Village and a third-party complaint against third-party defendants James Bateman and Nancy Smith. Counts I and II were brought pursuant to section 1983 of the Civil Rights Act and alleged that the Village's and third-party defendants' conduct violated the defendants' constitutional right to petition the court for a redress of grievances.

On April 21, 1993, the trial court dismissed with prejudice Count II, the tortious interference with contract claim, and Count III, the tortious interference with prospective economic advantage claim of the Village's amended complaint.

The defendants filed a counterclaim on July 26, 1993, in which they sought a declaration that the special service area ordinances were invalid. They filed their first amended counterclaim and third-party complaint on July 28, 1993. The theories of Counts I and II remained the same, first amendment and equal protection claims for damages. The Village filed a motion to dismiss the amended counterclaim, as did the third-party defendant, James Bateman.

On November 22, 1993, the Village filed its motion for partial summary judgment as to Count I of its amended complaint (declaratory judgment) and defendants' counterclaim for declaratory judgment.

The trial court dismissed with prejudice Count I (first amendment) of the first amended counterclaim. The defendants filed a cross-motion for summary judgment.

On March 30, 1994, the trial court ruled on the cross-motions for summary judgment, finding that the notice mailed by the Village did not satisfy the statute for service upon individual owners and also that the notice was insufficient in content. On that same day, the trial court denied Count I of the defendants' counterclaim, but did not rule on Count II of that claim. On May 4, 1994, the court granted the Village's summary judgment motion to dismiss Count II of the defendants' counterclaim.

On May 16, 1994, the Village filed a motion to reconsider asking the court to reverse its summary judgment order of March 30, 1994. The Village filed a notice of appeal on July 18, 1994.

On July 27, 1994, the defendants filed a Supreme Court Rule 137 motion for sanctions against the Village and attorney Bateman alleging that the tortious interference counts filed by the Village were not warranted by existing law and were filed for an improper purpose. The trial court granted the motion on August 11, 1994, finding that the Village filed the claim for the sole purpose of intimidating the defendants and that it was without any reasonable basis in law.

On August 16, 1994, the trial court entered an order denying a motion filed by the defendants for *nunc pro tunc* revision of the court's order of May 4, 1994. In that

motion, the defendants had requested that the court delete language from the order stating that there was no just reason to delay enforcement or appeal. The trial court denied the motion, but in so doing the court found that the language in question was merely surplusage, because at the time the May 4 order was entered, it was a final order. On August 17, 1994, the Village and James Bateman filed their supplemental notice of appeal, and the defendants filed their cross-appeal.

Initially, we note that the defendants have filed a motion requesting that we strike a portion of the Village's appeal brief and enter sanctions against the Village for raising a meritless argument regarding the timeliness of the defendants' cross-appeal. The Village has filed a response to that motion and a cross-motion to dismiss the defendants' cross-appeal.

The Village argues that the defendants' cross-appeal should be dismissed because it was not timely filed, and the July 27, 1994, motion for sanctions did not toll the time within which to file the cross-appeal. We disagree.

In *Gaynor v. Walsh* (1991), 219 Ill. App. 3d 996, a motion for sanctions was filed 25 days after the trial court's disposition of the last post-trial motion and five days after the other party had filed a notice of appeal. The court held that a Rule 137 motion for sanctions may be filed at any time during which the trial court has jurisdiction, which extends 30 days past the date the last order or judgment (which includes an order denying a post-trial motion) was issued in the case. (*Gaynor*, 219 Ill. App. 3d at 1002.) Moreover, the *Gaynor* court noted that the plaintiff's notice of appeal did not divest the trial court of jurisdiction to consider the defendant's later filed motion for sanctions. In fact, the court held that the

plaintiff's notice of appeal was rendered premature by the filing of the motion for sanctions.

In the instant case, the trial court's May 4, 1994, order was a final order under Supreme Court Rule 301 (134 Ill. 2d R. 301) because it disposed of all the claims in the case at the time it was entered. The trial court's July 18, 1994, order merely clarified that summary judgment had in fact been entered on March 30, 1994, with respect to the cross-motion for summary judgment on the validity of the ordinances. The final order entered on May 4, 1994, disposing of all the claims remaining in the case, was not rendered an order subject to Supreme Court Rule 304(a) (134 Ill. 2d R. 304(a)) merely because it contained Rule 304(a) language providing that there was "no just reason to delay enforcement or appeal."

Thus, the parties had 30 days from May 4, 1994, to file a notice of appeal or a post-trial motion. The Village filed a timely post-trial motion on May 16, 1994. That post-trial motion was denied on June 29, 1994. The defendants' motion for sanctions which was filed on July 27, 1994, within 30 days of the denial of the post-trial motion, was timely and rendered the Village's notice of appeal premature. The trial court granted the defendants' motion for sanctions on August 11, 1994. Therefore, the defendants' cross-appeal and the Village's supplemental notice of appeal filed on August 17, 1994, were timely, as the appeals were filed within 30 days of the court's sanction order. While we find that the Village's argument on this issue substantially lacked merit, we decline to impose sanctions against the Village under Supreme Court Rule 375(b) (134 Ill. 2d R. 375(b)).

[The preceding material is nonpublishable under Supreme Court Rule 23.]

The Village first argues on appeal that the trial court erred in finding that the Village did not satisfy the statutory notice requirements. The Village contends that it was only required to comply substantially with notice requirements, while the defendants claim that strict compliance was necessary.

Section 5 of the Special Service Area Tax Act (the Act) provides that notice of the hearing regarding the establishment of a special service area shall be given by publication in a newspaper of general circulation in the county and by mailing. (35 ILCS 235/5 (West 1992).) Section 5 further provides:

> "Notice by mailing *shall* be given by depositing said notice in the United States Mail *addressed to the person or persons in whose name the general taxes for the last proceeding year were paid* on each lot *** within the special service area. *** In the event taxes for the last preceding year were not paid, the notice shall be sent to the person last listed on the tax rolls prior to that year as the owner of said property." (Emphasis added.) 35 ILCS 235/5 (West 1992).

In *Andrews v. County of Madison* (1977), 54 Ill. App. 3d 343, the court had an opportunity to construe the notice requirements of section 5 of the Act. There, the plaintiffs brought an action to enjoin the county from taking any action in furtherance of its ordinance creating a special service area and providing for the financing of services in connection with the area. Among other things, the plaintiffs argued that the county failed to satisfy the notice requirements of section 5. The *Andrews* court held that the county substantially complied with the notice requirements even though some owners did not receive actual mail notice because the county sent some notices

to mortgagees without any cross-reference to the actual owners of record.

In *Grais v. City of Chicago* (1992), 151 Ill. 2d 197, our supreme court addressed the notice requirement of section 5 of the Act. There, notice was sent only to owners of commercial property within the special service area and not to owners of residential property. The court noted that the lack of notice was problematic because the statute requires that taxpayers be mailed individual notice before their property can be included within a special service area. However, the plaintiff in *Grais* did not claim that he did not receive notice. The court found that it could not invalidate the entire special service area based on a lack of notice to some owners. The court further stated that any taxpayer who is eventually taxed may have an individual dispute with the city if notice was not provided to him or to his predecessor-in-interest.

Applying *Grais* to the present case, we find that the clear import of the decision is that notice under the statute is not jurisdictional and the lack of notice to some taxpayers within the special service area does not invalidate the entire service area. However, we hold that the reasoning of *Grais* further requires that the Loiacono parcel be excluded from the special service area since Ruth Loiacono did not receive mail notice and she is a party to the instant proceeding. To the extent that *Andrews* is inconsistent with *Grais* and our holding on this issue, we decline to follow *Andrews*.

The Village next argues that the trial court erred in finding that the content of the notice sent by the Village did not satisfy the statutory criteria. The trial court did not specifically mention any particular defect in the notice to support its finding. However, the defendants

alleged the following deficiencies in the notice: (1) that in addition to stating that the purpose of the hearing was to consider the special service area; (2) that the notice did not state that interested persons could object to the formation of the area first and then have a further opportunity to object to the levy and issuance of bonds; (3) that the notice failed to advise interested persons that they could file objections regarding any issue appearing in the notice; (4) that it did not mention that the defendants could object to the issuance of bonds; and (5) that it did not state that interested persons would have an opportunity to file an objection *at the hearing*.

Initially, we note that to determine whether a statute is mandatory or discretionary, courts look first to the language of the statute as the best indication of legislative intent. (*Pullen v. Mulligan* (1990), 138 Ill. 2d 21, 65; *People ex rel. Village of Grayslake v. Village of Round Lake Beach* (1993), 242 Ill. App. 3d 750, 756.) If a statute imposes duties and by express language provides that the omission to perform the duties renders the proceeding void, then courts are bound to construe those provisions as mandatory. In most cases, however, the statute simply provides that certain acts shall be done within a particular time or in a particular manner and does not declare that their performance is essential to the validity of the proceeding; in these cases, the statute is directory. *People ex rel. Village of Grayslake*, 242 Ill. App. 3d at 756.

Applying the above-mentioned principles, we find that the statutory criteria regarding the content of the notice is directory and not mandatory. The statute does not provide that compliance with every detail of the content-of-notice provisions is essential to the validity of the pro-

ceeding. More importantly, we find that the Village complied with the notice requirements of the statute. The first and fourth of the purported deficiencies listed above are belied by the notice itself. Regarding the second alleged deficiency, we note that the requirement suggested by the defendants is not mandated by statute. Thus, we will not require it either since more specificity is not required by the statute. (See *Schwarzbach v. City of Highland Park)* (1980), 82 Ill. App 3d 807.) Lastly, we note that section 4(3) of the Act does not require notice of opportunity to file objections *at the hearing*. Rather, that section states only that the notice provide interested persons have an opportunity to file objections to the amount of the tax levy. Section 9 of the Act (35 ILCS 235/9 (West 1992)) does not require a different result. It does not require, as the defendants urge, that the Village ascertain and disclose the owners of record at the public hearing. Rather, its purpose is to provide a date for determining owners of record with respect to objectors' petitions. See 35 ILCS 235/9 (West 1992).

The Village next argues that the trial court erred in finding that Counts II and III of its amended complaint failed to state a cause of action. Specifically, the Village contends that the court erred in finding that defendants' conduct was conditionally privileged, because the privilege only applies to an attorney representing a client's interests. Count II of the amended complaint alleged that the defendants tortiously interfered with the Village's contract with Bernardi Securities, Inc., for the sale of the bonds to finance the improvements to the special service area. Count II alleged that the defendants tortiously interfered with the Village's economic advantage.

A trial court should dismiss a complaint for failure to state a cause of action only if it is clear that no set of facts can be proved which will entitle the plaintiff to recover. (*People ex rel. Daley v. Datacom Systems Corp.* (1991), 146 Ill. 2d 1, 11.) In assessing the sufficiency of the complaint, we must take as true all well-pleaded facts and reasonable inferences drawn from those facts. *Weinberger v. Bell Federal Savings & Loan Association* (1994), 262 Ill. App. 3d 1047, 1049-50.

It is well settled that Illinois courts will recognize a privilege in intentional interference with contract cases where the defendant was acting to protect an interest which the law deems to be of equal or greater value than the plaintiff's contractual rights. (*HPI Health Care Services, Inc. v. Mt. Vernon Hospital, Inc.* (1989), 131 Ill. 2d 145, 157.) It is axiomatic that acts involving the first amendment right to petition the government for redress of grievances involve an interest protected by the privilege. (*Arlington Heights National Bank v. Arlington Heights Federal Savings & Loan Association* (1967), 37 Ill. 2d 546, 550; *Mannion v. Stallings & Co.* (1990), 204 Ill. App. 3d 179, 189.) Where the conduct of the defendant appears to be privileged from the fact of the plaintiff's complaint, the plaintiff is required to plead and prove that the defendant's actions were done without justification. (*HPI Health Care*, 131 Ill. 2d at 156; *Arlington Heights National Bank*, 37 Ill. 3d at 551; *Mannion*, 204 Ill. App. 3d 179.) To state properly a cause of action for intentional interference with contractual rights, a plaintiff must state more than a mere assertion that the defendant's conduct was justified. *HPI Health Care*, 131 Ill. 2d at 158.) Furthermore, ill-will alone is not enough to establish lack of "justification"; there must be a desire to

harm, which is independent of and unrelated to a desire to protect the acting party's rights and which is not reasonably related to the defence of a recognized property or social interest. *Arlington Heights National Bank*, 37 Ill. 2d at 551.

Examining Counts II and III of the Village's amended complaint, it is clear that the counts were based on the defendants' actions of hiring an attorney to protect their property rights with respect to the imposition of the special service area. The complaint alleges that the defendants' attorney raised questions with respect to the validity of the ordinances and threatened litigation. This simply indicates that the defendants were exercising their first amendment rights to petition government for a redress of grievances. They were also attempting to protect their property interests. We find that under the circumstances of the case the defendants enjoyed a conditional privilege. The Village's insistence that only the defendants' attorney's conduct was privileged and not the conduct of the defendants is wholly without merit and is an exercise in faulty syllogism. Moreover, we find that the plaintiff failed to allege facts indicating that the defendants' conduct was unjustified. Additionally, we note that given the circumstances it is clear that the plaintiffs could prove no set of facts which would entitle them to recover. Accordingly, the trial court properly dismissed with prejudice Counts II and III of the Village's amended complaint.

Next, the Village and attorney Bateman argue that the trial court erroneously imposed sanctions against them pursuant to Supreme Court Rule 137 (134 Ill. 2d R. 137). They content that the tort claims in Counts II and III of the Village's amended complaint were filed in good faith and not for an improper purpose. We disagree.

Supreme Court Rule 137 provides in relevant part:

> "The signature of an attorney or party [on a pleading] constitutes a certificate by him that he has read the pleading *** that to the best of his knowledge, information, and belief formed after reasonable inquiry it is *** warranted by existing law or a good-faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. *** If a pleading *** is signed in violation of this rule, the court *** may impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay the other party or parties in the amount of reasonable expenses incurred because of the filing of the pleading." (134 Ill. 2d R. 137)

The purpose of Rule 137 is to penalize litigants who plead frivolous or false matters or bring suit without any basis in law. (*In re Marriage of Sykes* (1992), 231 Ill. App. 3d 940, 946). The test to be utilized in determining whether a violation has occurred is an objective standard of what was reasonable under the circumstances at the time the assertions were made. (*Lewy v. Koeckritz International, Inc.* (1991), 211 Ill. App. 3d 330, 334.) A trial court's decision to impose sanctions under the rule will not be disturbed absent an abuse of discretion, and an abuse of discretion will be found only where a trial court has made a decision no reasonable person could make. *In re Marriage of Sykes* (1992), 231 Ill. App. 3d 940, 946.

Here, the trial court stated in its written sanction order that Counts II and III were without any reasonable basis in law and did not represent a good-faith argument for the extension or modification of existing law. The

court further found that the claims were not filed for any legitimate purpose other than to intimidate the defendants into withdrawing their objections to the special service area. We find that the court's conclusions were supported by the facts of this case. As stated previously, the Village's argument that the conditional privilege only applied to attorneys was without merit and did not represent a good-faith argument for the modification of existing law. Accordingly, we are unable to say that no reasonable trial judge would have imposed sanctions in this case.

We will now address the defendants' cross-appeal. Count I of the defendants' amended counterclaim alleged that the Village, attorney Bateman, and Village president Nancy Smith violated section 1983 of the Federal Civil Rights Act, in that they attempted to deter the defendants from seeking a judicial determination of the validity of the ordinances. The defendants first argue that the trial court erred in dismissing Count I of their amended counterclaim on the basis that it was barred by the Noerr-Pennington doctrine. The defendants further argue that even if the Noerr-Pennington doctrine is initially applicable, the Village's conduct in filing its action for tort damages fell under the "sham" exception to the doctrine and was thus actionable pursuant to section 1983.

The essence of the Noerr-Pennington doctrine is that parties who petition the government for governmental action favorable to themselves cannot be sued under the Sherman Anti-trust Act, even though their actions are motivated by anti-competitive intent. (*United Mine Workers of America v. Pennington* (1965), 381 U.S. 657, 670, 14 L. Ed. 2d 626, 85 S. Ct. 1585, 1593.) This doctrine has

been extended to local governmental bodies to immunize them from suit. (*Monarch Entertainment Bureau, Inc. v. New Jersey Highway Authority* (D.N.J. 1989), 715 F. Supp. 1290, 1301-03.) Courts, however, have carved out an exception to the doctrine for "sham" litigation. (*Bill Johnson's Restaurants, Inc. v. NLRB* (1983), 461 U.S. 731, 740, 76 L. Ed. 2d 277, 286, 103 S. Ct. 2161, 2168; *California Motor Transports Co. v. Trucking Unlimited*, (1972), 404 U.S. 508, 513, 30 L. Ed. 2d 642, 646, 92 S. Ct. 609, 613; *Harrison v. Springdale Water & Sewer Comm'n* (8th Cir. 1986), 780 F. 2d 1422, 1428.) To constitute "sham" litigation a lawsuit must be objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits. *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.* (1993), 508 U.S. ___, ___, 123 L. Ed. 2d 611, 624, 113 S. Ct. 1920, 1928.

Here, the Village urges that the "sham" exception does not apply because this case does not involve any massive activities as in *California Motor Transport Co.* or repetitive lawsuits carrying the hallmark of insubstantial claims as in *Otter Tail Power Co. v. United States* (1973), 410 U.S. 366, 380, 35 L. Ed. 2d 359, 93 S. Ct. 1022, 1031. The Village also contends the exception is not applicable because the defendants were not eventually denied access to the courts.

The Village's arguments are erroneous. A single baseless suit is sufficient to invoke the sham exception. (*Clipper Express v. Rocky Mountain Motor Tariff Bureau, Inc.* (9th Cir. 1982), 690 F. 2d 1240, 1254-57; *USS-Posco Industries v. Contra Costa County Building & Construction Trades Council* (9th Cir. 1944), 31 F. 3d 800, 810-11.) Furthermore, a litigant need not prove that he was

actually barred from access to the courts as a prerequisite to maintaining an action with the aid of the "sham" exception to the Noeer-Pennington doctrine. (*Clipper Express*, 690 F. 2d at 1257-59; *Harrison*, 780 F.2d 161, 163.

The Village argues that the "sham" exception should not apply because the declaratory judgment action was not a sham and the tort claims were not clearly barred by the conditional privilege. The Village's arguments must be rejected. It cites no authority for the proposition that it could file sham litigation as long as one of several counts in the complaint had merit. Regarding the issue of whether the tort claims were clearly barred by the conditional privilege, we have already touched on that contention with our finding that the trial court correctly imposed sanctions for the filing of a baseless lawsuit. Taking the well-pleaded facts of the defendants' amended counterclaim as true, we find a trier of fact could conclude that the defendants were entitled to recover damages. Accordingly, Count I of the defendants' amended counterclaim should not have been dismissed.

Third-party defendants Bateman and Smith contend that they enjoyed qualified immunity from suit as public officials.

Governmental officials performing discretionary functions generally are shielded from liability from civil damages insofar as their conduct does not violate clearly established statutes or constitutional rights of which a reasonable person would have known. (*Harlow v. Fitzgerald* (1982), 475 U.S. 800, 801, 73 L. Ed. 2d 396, 400, 102 S. Ct. 2727, 2729.) This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that in light of preexisting law the unlawful-

ness must be apparent. (*Anderson v. Creighton* (1987), 483 U.S. 635, 640, 97 L. Ed. 2d 523, 531, 107 S. Ct. 3034, 3039.) In essence, the immunity protects "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs* (1986), 475 U.S. 335, 341, 89 L. Ed. 2d 271, 278, 106 S. Ct. 1092, 1096.

Applying these standards we find that a reasonable village president would have relied on the advice of the Village attorney that the course of conduct the Village was pursuing was proper and legal, and thus we find immunity applies to Smith. However, we find that in light of the preexisting law the immunity does not extend to attorney Bateman. Thus, we conclude that the trial court properly dismissed Count I of the defendants' counterclaim as it pertained to Smith, but erred in dismissing that claim as it pertained to Bateman.

The defendants next argue that the court erred in dismissing Count II of their amended counterclaim. Count II alleged that the Village violated principles of equal protection by intentionally gerrymandering the special service area to exclude owners and electors who were opposed to the project. The defendants further argue that the special service area was not needed and did not rationally relate to a legitimate purpose.

In support of its claim, the defendants presented the affidavit of Bruce Walterman. Walterman's affidavit revealed that he expressed his opposition to the special service area and thereafter his property was excluded. The defendants claim that he was excluded because he voiced his opposition and that this was improper.

We find that the trial court properly dismissed the defendants' claim. Section 6 of the Special Service Area

Tax Act specifically provides that a municipality may delete property from the special service area as long as the area remains contiguous after the deletion. (35 ILCS 235/6 (West 1992).) Here, the defendants do not argue that the area after the deletion of Walterman's property was not contiguous. Moreover, the Village explained that the special service area was designed to benefit the industrial park. The Village noted that Walterman's property was not strictly commercial since he lived on the property, and it was excluded for that reason. Regarding the defendants' claim that the special service area was not necessary or legitimate, we note that the evidence that the improvements would enhance the ability to fight fires within the district was unrebutted. Under these facts, we find that there was no issue of material fact with regard to a possible violation of the equal protection clause. Accordingly, we find that the trial court properly dismissed the plaintiffs' equal protection claim.

For the foregoing reasons, we reverse the trial court's order declaring the entire special service area to be invalid. However, we order that the Loiacono parcel be excluded for lack of notice. We affirm the trial court's order dismissing the Village's tort claims, Counts II and III of its amended complaint. We also affirm the trial court's order of Rule 137 sanctions against the Village and attorney Bateman. Regarding the defendants' cross-appeal, we reverse the trial court's order dismissing Count I of the defendants' counterclaim and third-party complaint and remand the cause for further proceedings, but affirm the order with respect to the dismissal of third-party defendant Smith. We also affirm the trial court's order dismissing Count II of the defendants' amended counterclaim.

The judgment of the Circuit Court of Lake County is affirmed in part and reversed in part, and the cause is remanded for further proceedings consistent with this opinion.

Affirmed in part; reversed in part and remanded.

RATHJE AND HUTCHINSON, JJ., concur.

ILLINOIS APPELLATE COURT
Appellate Court Building
Elgin, IL 60120

June 9, 1995

No. 93MR11

The Village of Lake Barrington et al., etc.,

Respondents

vs.

Mary E. Hogan, et al.,

Petitioners

Appeal from the Circuit Court
of County of Lake

ORDER

Upon consideration of the Petitions for Rehearing filed May 23, 1995, the Petitions for Rehearing are hereby denied.

(Thomas, Rathje, Hutchinson, JJ.)

ILLINOIS SUPREME COURT
Supreme Court Building
Springfield, IL 62706

October 4, 1995

No. 79405

The Village of Lake Barrington et al., etc.,

Respondents

vs.

Mary E. Hogan, et al.,

Petitioners

Appeal from the Illinois Appellate Court
Second Judicial District

ORDER

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on October 26, 1995.

IN THE ILLINOIS CIRCUIT COURT
FOR THE NINETEENTH JUDICIAL CIRCUIT
LAKE COUNTY, ILLINOIS
CHANCERY DIVISION

[Dated March 30, 1994]

VILLAGE OF LAKE BARRINGTON, et al., etc.	)	
Respondents	)	
vs.	)	No. 93 MR 11
MARY E. HOGAN, et al.	)	
Petitioners	)	

SUMMARY JUDGMENT

This matter before the Court upon cross motions of **SUMMARY JUDGMENT**, due notice having been given, briefs having been filed, oral argument having been heard, with the Court being fully advised in the premises, it is hereby ordered:

1) The Court finds that there are no genuine issues of material fact to be tried by the Court;
2) The Court finds as a matter of law that no gerrymandering of the SSA Boundaries occurred;
3) As a matter of law, the SSA is not irrational;
4) As a matter of law, the **NOTICE** did not meet the statutory requirements for service upon individual property owners and was legally insufficient in content;

5) The bench trial date of May 31, 1994 is hereby stricken;

6) The **MOTION FOR SUMMARY JUDGMENT** with respect to Count II of the Counterclaim is hereby stricken;

7) Upon a waiver of notice and stipulation, the **SUMMARY JUDGMENT MOTION** with respect to Count II is hereby entered; Counter-Plaintiffs shall have 28 days to respond;

This matter is set for oral argument on May 4, 1994 at 9:00 a.m. without further notice.

S/S: William D. Block
Judge William D. Block

DATE: March 30, 1994

Supreme Court, U.S.
FILED
FEB 6 1996
CLERK

No. 95-1097

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

MARY E. HOGAN, COLE TAYLOR BANK, AS TRUSTEE UNDER TRUST NO. 77-432 DATED DECEMBER 19, 1977, SAM LOIACONO, RUTH LOIACONO, and LAKE BARRINGTON INDUSTRIAL PARK ASSOCIATION,

Petitioners,

v.

VILLAGE OF LAKE BARRINGTON, an Illinois Municipal Corporation, and VILLAGE OF LAKE BARRINGTON SPECIAL SERVICE AREA NUMBER THREE,

Respondents.

On Petition for Writ of Certiorari to the Appellate Court of Illinois, Second District

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

MARY E. HOGAN, COLE TAYLOR BANK, AS TRUSTEE UNDER TRUST NO. 77-432 DATED DECEMBER 19, 1977, SAM LOIACONO, RUTH LOIACONO, and LAKE BARRINGTON INDUSTRIAL PARK ASSOCIATION,

Petitioners,

v.

VILLAGE OF LAKE BARRINGTON, an Illinois Municipal Corporation, and VILLAGE OF LAKE BARRINGTON SPECIAL SERVICE AREA NUMBER THREE,

Respondents.

On Petition for Writ of Certiorari to the Appellate Court of Illinois, Second District

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

In December, 1990, the Village of Lake Barrington (Respondent) hired John Reindl as a special projects coordinator to coordinate the creation and implementation of a special service area. (C-1115[1]) The special service

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[1] The references to the record before the Illinois Appellate Court are included as "(C-. . .)".

area would be benefitted by the installation of a potable water line system to service the properties together with a water supply and storage system, certain drainage improvements, and a sanitary sewerage collection system in an area known as the Lake Barrington Industrial Park. ("Park") The improvements would also include reconstruction and rehabilitation of certain roads, the cost of which would be paid by the Village, not assessed through the special service area. (C-759, 760) The Park does not have sewer or municipal water, but is served by individual well and septic systems. (C-811) The Park receives fire protection from the Village of Barrington through an intergovernmental agreement. Presently, the lack of a municipal water supply severely hampers the ability of the fire department to fight fires within the Park. Over the past several years, the Fire Department has had to fight several significant fires within the service area. In several instances, despite best efforts by the fire department and as many as twelve neighboring fire departments, the fire department was unable to prevent the fires from causing total losses of the buildings and contents. This is due primarily to the lack of a municipal water supply for the special service area. As a result, the fire department is forced to tank in the water for fire-fighting purposes. This alternative is much slower, and prevents the fire department from putting enough water on the fire in a quick enough response to have a meaningful effect on the fire. In the opinion of the fire chief, Steven Figved, the installation of a municipal water system through the special service area will significantly improve the ability of the Fire Department to put out fires within the Park. The system would also provide property owners with the opportunity to install sprinkler systems within their buildings, with a potential for sig-

nificant reduction in their insurance premiums. Even without the installation of sprinkler systems, property owners should experience significant reductions in casualty insurance premiums due to the installation of the municipal water system. (C-773-774)

Mr. Reindl initially canvassed the proposed special service area to ascertain the degree of support, which existed for the proposed project. (C-759-760)

After the canvass, the Village held two public informational meetings on January 22, and April 22, 1992, for the property owners, who had been invited to attend. Professional consultants were present to explain the project, including the engineering and financing aspects. (C-760)

After the two informational meetings were held, the Village elected to go forward on the project. It adopted its first ordinance, 92-O-22, on July 7, 1992 (C-248-256), which established a public hearing date of July 29, 1992.

The Village then proceeded to satisfy the statutory notice requirements. Notice of the hearing was published in the *Daily Herald* on July 13, 1992. (C-351-352) The notice was also mailed to the persons or persons in whose names the general taxes for the preceding year had been paid, based on the information provided to Mr. Reindl by the Lake County Treasurer's office. (C-232-233, 1116) The notices were sent by first class mail *and also by certified mail.* (C-1116)

The Petitioner, Ruth Loiacano, one person of two persons in whose names the taxes had been paid for a single parcel (PIN 13-28-202-008, C-897), contended that she was not mailed the notice (C-881), but did not ever suggest that she did not *receive* the notice, that she was not

aware of the public hearing, that she did not attend the public hearing, or that she was in any way prejudiced by the alleged failure to mail her the notice. The notice was sent to the Loiaconos, and was signed for by her husband, Sam Loiacono. (C-1116, 1154, 1155) She did file a statutory objection. (C-328)

Various newspaper articles also reported on the proposed special service area (C-1197-C-1203), and at least one article reported the date of the public hearing. (C-1200-1201)

The public hearing was held on July 29, 1992. At that time, the public was afforded the opportunity to comment and ask questions. The Village's professional consultants also attended this hearing and were available to explain the project and to answer questions. (C-233, 258-308)

After the hearing was adjourned on July 29, 1992, certain objections were filed (C-310-340), which included the objections of the Petitioners, Mary Hogan, Sam Loiacano (C-329), and Ruth Loiacano. (C-328) However, the objections had no legal impact on the proceedings as they were insufficient in number to aggregate the required 51% to prevent the creation of the special service area, the levy of taxes, and the sale of bonds. Specifically, only 2 of the 5 registered voters signed objections, and only 46 out of 127 owners of record filed objections. (C-233-234)

The Village elected to move forward on the project. It adopted Ordinance 92-O-35 on October 20, 1992, which established the special service area. (C-342-353) The special service area, as established, consisted of 100 separate parcels and 127 owners of record. (C-233-234) It adopted Ordinance 92-O-36 on November 17, 1992, which provided for the levy of taxes and sale of bonds in the aggregate amount of $7,000,000.00. (C-355-380)

The Village has expended in excess of $645,568.99 upon the special service area, including $396,681.99 for engineering services and $96,366.39 for administrative services and costs. (C-1458, 1471, 1474-1478)

On January 5, 1993, the Village filed a two-count complaint against Mary Hogan, Sam Loiacono, Ruth Loiacono, certain other parties, and certain unknown owners. The complaint sought a declaration of the validity of the special service area ordinances, as well money damages for tortious interference with contract. (C-1-156). This complaint was dismissed by the circuit court. The Village then filed an amended complaint (C-226) with leave of court. (C-229-394) The amended complaint consisted of three counts. Count I sought a declaration of the validity of the special service area ordinances. Count II was a claim for tortious interference with contract, and Count III was a claim for tortious interference with prospective economic advantage.

The Petitioners filed a counter-complaint and third party complaint. (C-424-432) Counts I and II were 42 USC 1983 actions for damages for alleged violation of the First Amendment and equal protection provisions of the U.S. Constitution.

The circuit court dismissed with prejudice Counts II and III of the Village's amended complaint. (C-447, 448)

The Petitioners filed a Counterclaim, in which they sought a declaration that the special service area ordinances were invalid (C-520-582), and also filed their First Amended Counter-complaint and Third Party Complaint on July 28, 1993. (C-583-626) The theories of Counts I and II remained the same; First Amendment and equal protection claims for damages. The Lake Bar-

rington Industrial Park Association filed a petition to intervene, which was granted. (C-633)

The Village filed a motion to dismiss the Amended Counter-complaint (C-641-658), as did the third party defendant, James Bateman (Village Attorney). (C-689-699) The circuit court dismissed with prejudice Count I (First Amendment) of the First Amended Counter-complaint. (C-817-818)

The Village filed its motion for partial summary judgment (C-736-815) as to Count I of its Amended Complaint (declaratory judgment) and Petitioners' Counterclaim for Declaratory Judgment and subsequently filed a reply in support of the motion. (C-1092-1204) The Petitioners filed a cross motion for summary judgment (C-850-853), which was later amended. (C-963-1042)

On March 30, 1994, hearing was held on the cross motions for summary judgment. The circuit court ruled that the notice mailed by the Village did not satisfy the statute for service upon individual owners and also held that the notice was insufficient in content, but did not specify any particular defect. (C-1406-1407) The Village was granted leave to file its motion for summary judgment as to Count II of the Counter-complaint (equal protection), which was granted. (C-1437)

The circuit court entered summary judgment in favor of the Petitioners on the declaratory judgment actions regarding the validity of the special service area ordinances (C-1503-1504), and the Respondents filed their Notice of Appeal. (C-1500-1502)

In its May 2, 1995, opinion (App. 1 through App. 22 to the Petition for Writ of Certiorari), the Illinois Appellate

Court reversed the circuit court and found the special service area ordinances valid, but excised the Loiacono parcel from the special service area, because the Court found lack of notice to Ruth Loiacono. The Appellate Court also reversed the circuit court's grant of summary judgment to the Village and James Bateman as to Count I of the cross-claim, which alleged a cause of action for damages for an alleged First Amendment violation. As to that issue, the Appellate Court held that Bateman did not enjoy qualified immunity from the damage claim. In all other respects, the circuit court was affirmed. *The case was remanded for further proceedings consistent with the opinion.* These proceedings would involve a trial on the merits of Count I of the Counterclaim, the First Amendment claim, and entry of summary judgment in favor of the Respondents, finding the special service area ordinances valid.

REASONS TO DENY THE WRIT OF CERTIORARI

There are at least five dispositive reasons why a writ of certiorari should be denied.

A. NOT A FINAL ORDER

The decision of the Illinois Appellate Court is not a final order within the meaning of 28 USC 1257(a). Section 1257(a) specifically requires that the order appealed from be final. The case has been remanded for further proceedings to the Illinois circuit court. These proceedings would include a trial on the merits of Count I of the Petitioners' counterclaim, the first amendment claim,

and entry of summary judgment in favor of the Respondents finding the special service area ordinances valid. After the case is fully resolved at the circuit court level, the non-prevailing parties would have the right to appeal once again to the Appellate Court regarding the First Amendment claim. Ill. Sup. Ct. R. 301. After the Illinois Appellate Court decided that appeal, any party could once again seek leave to appeal to the Illinois Supreme Court. Ill. Sup. Ct. R. 315. If the Illinois Supreme Court granted the petition, the entire case would be before it, including the issues previously addressed in the Illinois Appellate Court opinion, from which the Petitioners now seek a writ of certiorari. *Sjostrom v. Sproule* (1965) 33 Ill. 2d 40, 210 N.E.2d 209; *Anderson v. Board of Education of District No. 91* (1945) 390 Ill. 412, 61 N.E.2d 562; *Frank v. Salomon* (1941) 376 Ill. 439, 34 N.E.2d 424; *Schrock v. Shoemaker* (1994) 159 Ill. 2d 533, 640 N.E.2d 937, 939; Ill. Sup. Ct. R. 318, 366. Since the order is not final, indeed, since it is a long way from being final, the petition for a writ should be denied. *Flynt v. Ohio* (1958) 451 U.S. 619, 101 S.Ct. 1958, 1959-1961, 68 L.Ed. 489; *O'Dell v. Espinoza* (1982) 456 U.S. 430, 102 S.Ct. 1865, 1866, 72 L.Ed. 237.

B. NO FEDERAL QUESTION RAISED

28 USC 1257(a) requires that a federal question be raised to invoke the jurisdiction of the United States Supreme Court. The petition for writ lists in its Table of Authorities the Fourteenth Amendment to the United States Constitution. However, the argument portion of the petition, which is titled "Reasons for Granting the Writ of Certiorari" fails to explain how the Fourteenth Amendment is even remotely involved in the special ser-

vice area creation process. Indeed, the petition does not even mention the Fourteenth Amendment, how it was possibly contravened, nor the term "due process", anywhere in its argument. The petition does not hint how the request for a writ satisfies Sup. Ct. R. 10. The petition does not satisfy Sup. Ct. R. 14(1)(g)(i) in that it fails to indicate how and when a federal issue was raised in the State court proceeding. This is understandable, since no federal issue was raised by the Petitioners before the Illinois Appellate Court, nor the circuit court. Since the petition for writ establishes neither a federal question, nor that any federal question was even raised, the petition should be denied. Sup. Ct. R. 10 and 14; 28 USC 1257(a); *Illinois v. Gates* (1983) 462 U.S. 213, 103 S.Ct. 2317, 2321-2324, 76 L.Ed. 257.

C. NOTICE ISSUE IS MOOT

The Petitioners have failed to assert an actual controversy regarding the issue of notice to the property owners of the creation of the special service district. It is undisputed that Sam Loiacono and Mary Hogan were mailed the notice prescribed by 35 ILCS 235/5. The Defendants have never contended that the Lake Barrington Industrial Park Association, which does not own any property within the proposed special service area, was entitled to any notice. Nor have the Petitioners ever suggested that Cole Taylor Bank as Trustee under Trust No. 77-432 dated December 19, 1977 was entitled to any such mailed notice. Ruth Loiacono is the only Petitioner who contended that she was not mailed the requisite notice. The Illinois Appellate Court decision addressed her objection that she was not mailed the notice and granted her relief, by excising the parcel, of which she

was a partial owner, from the special service area. Thus, there is no justiciable issue remaining regarding the issue of mailing of notices. This issue is moot, and accordingly, the petition for writ should be denied. *County of Los Angeles v. Davis* (1979) 440 U.S. 625, 99 S.Ct. 1379, 1383, 59 L.Ed.2d 642; *Amalgamated Assoc. v. Wisconsin Employment Relations Board* (1951) 71 S.Ct. 373, 374-375. The Petitioners have no standing to complain that other persons may not have been mailed notice. Those other persons are not parties. *Lujan v. Defenders of Wildlife* (1992) 504 U.S. 555, 112 S.Ct. 2130, 2135-2139; *Ciacco v. City of Elgin* (1980) 85 Ill.App.3d 507, 511-513, 40 Ill. Dec. 877, 407 N.E.2d 108.

D. FEDERAL ISSUE WAIVED

Assuming arguendo that the petition for writ asserts a federal question, this issue was waived by the Petitioners by failing to raise it below. The Illinois Appellate Court can hardly be faulted for failing to address an issue not raised by the Petitioners. To the extent that the petition for writ raised any federal question, this issue was waived by the Petitioners by failing to raise the issue below. *Youakim v. Miller* (1976) 425 U.S. 231, 96 S.Ct. 1399, 1401; *Illinois v. Gates* (1983) 462 U.S. 213, 103 S.Ct. 2317, 2321-2324, 76 L.Ed. 257. The petition for writ should therefore be denied.

E. NO BONA FIDE ISSUE RAISED

Even if one ignores the fatal defects of the petition for writ, which have already been discussed, the Petitioners have failed to raise a bona fide issue for review by this Court. The Petitioners fail to explain how the alleged

failure to mail notice to certain non-parties, who may have had actual notice through the publication notice or had seen the notice that was mailed to their co-owners, or who otherwise have expressed no quarrel with the creation of the special service area, presents a federal question, which is ripe for review. The Petitioners fail to explain how the two cases upon which they rely, which antedate the creation of the special service district by over one hundred years, present a federal question. Illinois courts have held the notice requirements of the special service area statutes are not jurisdictional, but rather directory in nature. *Grais v. City of Chicago* (1992) 151 Ill.2d 197, 601 N.E.2d 745; *Village of Lake Barrington v. Mary Hogan* (1995) 272 Ill.App.3d 225, 649 N.E.2d 1366, 208 Ill. Dec. 705; *Andrews v. Madison County* (1977) 54 Ill.App.3d 343, 12 Ill. Dec. 35, 369 N.E.2d 532. Neither *Lyon v. Alley* (1889) 130 U.S. 177, nor *French v. Edward* (1872) 80 U.S. 506, point to a different result. In both of those cases, the Supreme Court was dealing with the issue of the directory versus mandatory nature of the obligations bestowed upon certain officers in the discharge of their official duties. In both cases, the aggrieved parties stood to lose title to their properties because of substantial non-compliance with the statutory requirements, such as failing to sell only the smallest portion of the property to satisfy the delinquent tax, as in *French*. Here, the Petitioners do not suggest how they are even remotely aggrieved by the alleged failure to mail notice to certain other persons, who are not parties. The Petitioners have failed to raise a bona fide issue that would warrant review by the United States Supreme Court.

CONCLUSION

For any and all of the reasons stated herein, the petition for writ of certiorari should be denied. A fair reading of the petition yields the conclusion that it is without merit, and was filed solely for the purpose of delay. The Plaintiffs, who have spent in excess of $645,000 to create the special service district to provide sewer and water and greatly enhanced fire-fighting capability to the industrial park, respectfully request that the petition for writ of certiorari be denied.

Respectfully submitted,

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